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PACIFICA FOUNDATION; NATIONAL FEDERATION OF COMMUNITY BROADCASTERS; PUBLIC RADIO INTERNATIONAL; NATIONAL ASSOCIATION OF COLLEGE BROADCASTERS; INTERCOLLEGIATE BROADCAST SYSTEM; PEN AMERICAN CENTER; ALLEN GINSBERG,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondents' response to the petition avoids the important constitutional questions this case raises. Respondents defend the decision of the court of appeals by studiously ignoring that Congress' broadcast ban extends to works of unquestioned political, social, literary, and artistic merit. They also invoke "common sense" and out-dated precedents that have little if any bearing on the issues presented for review. (Opp. 11, 12.)[1/] Respondents begrudgingly urge the Court to defer consideration of the instant petition until it has resolved a challenge to a related provision of the Telecommunications Act of 1992 governing indecent cable transmissions.[2/] *See Denver Area Educational Tel. Consortium* v. *FCC*, No. 95-124; *Alliance for Community Media* v. *FCC*, No. 95-227, *cert. granted* (Nov. 13, 1995). By recognizing the partial overlap among these cases, respondents unintentionally underscore the seriousness of petitioners' constitutional claims and identify additional reasons why the Court should issue a writ of certiorari in this case to undertake a concurrent review of Congress' indecency regulations as applied to both the broadcast and cable media.

1. Respondents would have the Court believe that the only speech prohibited by the 6 a.m. to midnight broadcast ban[3/]

[1/] References to "(Opp. __)" are to the pages of the Brief for the Respondents. References to "(Pet. __)" are to the pages of the Petition.

[2/] Section 16(a) of the Act regulates indecent programming broadcast over radio and television stations; section 10(a) regulates indecent programming transmitted over leased access and public access cable television channels. (Opp. 18.)

[3/] Respondents incorrectly suggest that petitioners Pacifica Foundation et al. challenge only the 6 a.m. to midnight broadcast ban and not the narrower 6 a.m. to 10 p.m. ban. (Opp. 9, n.3.) Although the thrust of

is little different than rank obscenity and thus has only marginal constitutional value. (Opp. 3-4.) As petitioners have shown, however, Congress' broad and vague definition of indecency -- heretofore unreviewed by the Court -- encompasses broadcasts of serious literary and artistic works as well as discussions of significant political and social issues such as AIDS, rape, war, and adult sexuality. (Pet. 12-14.) The FCC's enforcement actions themselves demonstrate beyond cavil the wide range of meritorious expression it may censor. (Pet. 13 & n.6.) Moreover, numerous broadcasters, including in particular non-commercial radio stations, have in the past and are likely again in the future to engage in self-censorship of meritorious programs to avoid adverse action by the FCC. (Pet. 14.) It is precisely because the combination of the FCC's regulatory scheme and its sweeping definition of indecency cuts such a wide swath across protected core speech that a meaningful safe harbor period must be permitted. *See Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1335 (D.C. Cir. 1988) (Ginsburg, J.).[4/]

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petitioners' argument focuses on the broader ban, their assertion that there are lesser restrictive means than channeling available to regulate broadcast indecency -- in particular separate regulation of public radio, channel or station-specific restrictions, and use of the so-called "V-chip" (Pet. 28-30, & nn.16,17) -- necessarily implies that the slightly broader safe harbor crafted by the court of appeals is as constitutionally defective as the 18-hour broadcast ban.

Moreover, the court of appeals expressly affirmed the constitutionality of the 6 a.m. to midnight ban precisely because Congress, the FCC, and the parties to this litigation have all focused their arguments (including those of the government here) on the 18-hour broadcast ban. Thus, the government's assertion (Opp. 8-9) that the constitutionality of the wider ban is not presented for review is without merit.

[4/] Respondents' assertion that certiorari should be denied because other courts of appeals may review the application of section 16(a) in the context of a forfeiture proceeding fails to acknowledge that the District of Columbia Circuit is given exclusive jurisdiction over a wide variety of

2. Respondents' arguments concerning the burden the government must meet to uphold a content-based regulation of protected speech are similarly flawed in that they are based on a misreading of out-dated case law and a failure to apply the principles the Court has articulated in recent decisions addressing the First Amendment.

a. Respondents rely on *Ginsberg* v. *New York*, 390 U.S. 629, 642 (1968) for the proposition that the government need not provide evidence of a "causal link" between indecent speech and harm to minors, but instead may regulate such

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FCC actions involving broadcasting. *See* 47 U.S.C. § 402. Moreover, indecency forfeiture proceedings are rarely, if ever, subject to judicial review and then only after years of delay. *See Action For Children's Television* v. *FCC*, 59 F.3d 1249, 1254 (D.C. Cir. 1995), *petition for cert. filed*, Oct. 16, 1995 (reported as *South Fork Broadcasting Corp.* v. *FCC* in advance copies of federal reporter). Given the numerous obstacles to judicial review, the circuit split contemplated by respondents is unlikely to develop, allowing the restriction and associated chill of First Amendment freedoms to continue unchecked by the Court's review. Under these circumstances, the sharp divisions within the District of Columbia Circuit, both as presently and formerly constituted, cry out for review by the Court.

In addition, although no other court has reviewed the constitutionality of this latest version of section 16(a), recent decisions by other courts of appeals addressing indecent speech generally are in tension with the District of Columbia Circuit's treatment of that category of expression. *See, e.g., AIDS Action Committee of Massachusetts, Inc.* v. *Massachusetts Bay Transportation Authority*, 42 F.3d 1, 9, 13 (1st Cir. 1994) (in striking down on First Amendment grounds transportation authority's refusal to run controversial AIDS prevention advertisements described as "sexually explicit" and "patently offensive," court concluded that the ads "are most certainly *not* obscene, and fall well within the heartland of speech that we, as a society, should be willing to tolerate in the marketplace of ideas"); *Triplett Grille, Inc.* v. *City of Akron*, 40 F.3d 129, 136 (6th Cir. 1994) (striking down on First Amendment grounds city ordinance that "prohibits all public nudity, including live performances with serious literary, artistic or political value"). This tension provides further support for reviewing the court of appeals' decision in this case.

speech based on "common sense." (Opp. 11.) Fatally, respondents ignore that *Ginsberg* concerned *obscenity* and that as a result the Court only considered whether the statute's regulation of obscenity had a "rational relation" to the government's objective of safeguarding minors from harm. *Id.* at 643. Manifestly, the Court did not address the burden the Constitution imposes when speech fully protected by the First Amendment is at issue. *See* (53a-54a) (Edwards, C.J., dissenting.) On that question, numerous cases decided since *Ginsberg* have held that the government "must do more than simply posit the existence of the disease to be cured." *Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445, 2470 (1994). Rather it must "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id. See also, e.g., Rubin* v. *Coors Brewing Co.*, ___ U.S. ___, ___, 115 S. Ct. 1585, 1592-93 (1995); *FCC* v. *League of Women Voters of Cal.*, 468 U.S. 364, 391 (1984). Respondents ignore these recent precedents which, on their face, compel the rejection of their appeal to "common sense" where First Amendment freedoms are at stake.

b. Moreover, even "common sense" compels rejection of the regulatory scheme at issue. As we have shown, materials potentially falling within the statute's broad definition of indecency not only are easily accessible to teenagers in our society, but often are made available to them in the nation's public schools. (Pet. 25.) "Common sense" dictates that such materials, which include, *inter alia*, major works of literature, sexual education materials, and discussion of topics relating to sexuality and public health, necessarily cannot be deemed harmful to minors when teachers and educators widely conclude that the materials are of considerable educational value.[5/]

[5/] As recent court decisions make clear, schools have also found educational value in discussing with students AIDS prevention measures that include "sexually explicit" materials and "profane, lewd and

c. Respondents' focus on "effective" parental supervision of children ignores the Court's teachings in *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983), that the relevant constitutional inquiry is whether parents have the *opportunity* to supervise their children's listening and viewing habits. It is telling that respondents cite no case law to support their analysis. (*See* Opp. at 11-13.)

The real thrust of the government's argument is apparent from its hypothetical involving a toddler at risk of injury from common household objects. According to respondents, the only way parents can be certain that their children are not exposed to "dangerous implements or poisonous substances" only by "child-proofing their home." By analogy, respondents argue that parents can control their children's listening and viewing habits only by means of a government-imposed broadcast ban encompassing the hours when most adults and children are awake. (Opp. 12.)[6/] It is remarkable that respondents have equated constitutionally protected speech with poison. It is equally remarkable that respondents have failed to notice that childproofing of homes is a task commonly performed by parents, without the compulsory oversight of government bureaucrats. But even putting aside that respondents'

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lascivious language to describe body parts and excretory functions." *See, e.g., Brown* v. *Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525 (1st Cir. 1995).

[6/] The government attempts to justify its ban by complaining that parents "have other things to do" than to exercise parental control. (Opp. 12.) Determination of the proper degree of parental supervision, of course, is a decision for parents to make, not Big Brother. Similarly, whether parents choose to permit their children to have radio or television sets in their own room is a matter of parental choice, and, in any event, does not preclude exercise of parental authority over the use made of the sets. The vagaries of parental control do not require permitting the FCC to invade every child's, and by extension, every citizen's bedroom, living room, and den.

childproofing analogy fails on these grounds, the analogy also directly conflicts with the Court's analysis in *Sable Communications of Cal., Inc.* v. *FCC*, 492 U.S. 115 (1989).

In *Sable*, the Court rejected as "quite unpersuasive" the government's assertion that a ban on indecent telephone communications was constitutional because it was the most effective means of protecting children from exposure to those communications. *Id.* at 128. Notwithstanding that any other means of regulation would not be "foolproof," the Court held that the ban violated the First Amendment precisely because its denial of adult access to indecent telephone messages "far exceeds that which is *necessary* to limit the access of minors to such messages." *Id.* at 131, & n.10 (emphasis added). Respondents' arguments based on "effective" parental supervision cannot be squared with the Court's reasoning in *Sable*.

3. Equally misguided is respondents' attempt to shield the 18-hour broadcast ban from constitutional review by arguing that it is merely a legislative judgment to which the Court must conclusively defer. (Opp. 16.) The Court's case law, ignored by respondents, undermines this precise assertion. *See, e.g., TBS*, 114 S. Ct. at 2471 (Court has "an obligation to exercise independent judgment when First Amendment rights are implicated"). Without such independent review, "the scope of freedom of speech . . . would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 844 (1978).

As petitioners have demonstrated, the question of least restrictive means is decidedly not "a matter for legislative judgment." (Opp. 16.) To the contrary, the broad sweep of the FCC's definition of indecency, together with a channeling rule that "stretch[es] to all but the hours most listeners [and viewers] are asleep," *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1335 (D.C. Cir. 1988) (Ginsburg, J.), makes the determination of a reasonable safe harbor "a constitutional

necessity." (61a) (Wald, J., dissenting.)

Petitioners have conclusively shown that the record does not support the government's presumption of harm from indecent speech. (Pet. 22-23, & nn.13, 14.) They have also highlighted numerous less restrictive alternatives to a sweeping channeling rule, including a narrower regulation specifically tailored to the listening habits of the radio audience, channel or station-specific restrictions on indecent broadcasts, and use of the so-called "V-chip," which permits parents to block programs they do not wish their children to view. (Pet. 29-30.) Consideration of each of these alternatives, admittedly absent here, is required under the "exacting scrutiny" mandated by *TBS* and *Sable* to ensure that the government does not impose unnecessary burdens on protected expression.

4. Respondents' treatment of the First Amendment rights of adults and maturing minors is nothing short of startling. Respondents utterly ignore that Congress' exclusive concern in establishing the broadcast ban was to minimize the number of children in the audience; it made no effort to balance the First Amendment rights of adult viewers and listeners to receive constitutionally protected speech. (Pet. 23-24.) Nor did Congress consider the First Amendment interests of older minors, other than to lump together all "children" under 18 for purposes of the broadcast ban.[7/] The absence of such constitutional balancing is inconsistent with a long line of precedents supporting the free speech rights of minors. *See,*

[7/] Respondents' contention that adults and minors have non-broadcast alternatives to receive indecent expression ignores the Court's repeated admonition that content-based restrictions on speech cannot be justified on the ground that "other channels of communication" remain open. *Bolger*, 463 U.S. at 69, n.18. *See also, e.g., Shad* v. *Borough of Mt. Ephraim*, 452 U.S. 61, 76-77 (1981); *Schneider* v. *State*, 308 U.S. 147, 163 (1939). It also ignores the crucial fact that speech containing indecent material, including in particular live news reports and live talk shows, loses much of its value if communicated to its audience at a later time.

e.g., *Bolger*, 463 U.S. at 74, n.30; *Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 692, n.14 (1977); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 213-14 (1975). The government's response to this constitutional mandate -- urging "maturing teens . . . to stay up late and avail themselves of the statutory safe harbor" (Opp. 15, n.6) even when such behavior is contrary to their parents' wishes -- merely highlights the way in which the broadcast ban undermines rather than promotes parental supervision of children.

5. Finally, the Court's recent grant of certiorari in *Denver Area Educational Tel. Consortium* and *Alliance for Community Media* underscores the need for review of the court of appeals' decision upholding the 18-hour broadcast ban. Indeed, respondents themselves correctly state that "the interests advanced to support the constitutionality of the cable regulations in [those cases] are *similar* to the interests advanced to support the constitutionality of the broadcast television regulations in this case." (Opp. 19) (emphasis added.) If the Court wishes to resolve in an efficient manner the question of Congress' constitutional authority to regulate indecent broadcast and cable programming, it should grant certiorari in these cases and hear them, or at least decide them, together with the cable indecency decisions.

The cable cases currently before the Court concern restrictions on indecent speech enacted by Congress in the same statute that is at issue in the instant petitions. Both sets of cases were argued before the District of Columbia Circuit on the same day and were decided by the same 7-to-4 majority of the en banc court of appeals. More significantly, the reasoning employed by the court of appeals majority in the cable cases draws in part on its analysis of broadcast indecency and, what is more, highlights the error of the majority's decision upholding the 18-hour ban. *See Alliance for Community Media* v. *FCC*, 56 F.3d 105, 125 (D.C. Cir. 1995) (en banc), *cert. granted*, (Nov. 13, 1995) ("segregation and blocking appear to accommodate the interests of those viewers who want indecent

programming better than would a safe harbor system, under which cable viewers would be confined to watching such programming during designated, often inconvenient time periods"). *See also* (57a) (Edwards, C.J. dissenting) (stressing government's reliance on segregate-and-scramble technology in cable media but failure to consider applying such technology to broadcast media).

In reviewing "the application of the First Amendment in the context of 'indecent' speech in the broadcast media," including cable, Chief Judge Edwards recently lamented the hopelessly muddled state of the law and urged the Court to remedy this confusion:

> I have come to the conclusion that the law is in a state of disarray. Application of the First Amendment in this context seems to border on the whimsical, for as often as not there is little coherence in the case law. For example, I have yet to comprehend the distinction that is drawn between *broadcast* and *cable* television, with broadcast stations having reduced First Amendment rights even though cable is concededly much more responsible for the showing of indecent programming. . . .
>
> I conclude with an innocent hope that the Supreme Court will one day soon lend some clarity to these areas of First Amendment jurisprudence.

Action for Children's Television v. *FCC*, 59 F.3d 1249, 1263, 1264 (D.C. Cir. 1995) (Edwards, C.J., concurring with reservations), *petition for cert. filed*, Oct. 16, 1995.

Petitioners respectfully urge the Court to heed Judge Edwards' words and to issue a writ of certiorari in this case to resolve Congress' attempt to regulate indecent expression over the nation's airwaves and cable transmission lines.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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